of the peace or which might reasonably have lead to a breach of the peace. Stated another way, petitioners were arrested and prosecuted, not because of *what* they were saying, but because of the *effect* of their speeches upon the crowd—a crowd characterized by petitioners' own attorney as a "mob." (RB 51)

The issue squarely presented by this petition for a writ of certiorari is: Have the four state courts which have considered the charges against petitioners and which have considered whether petitioners' actions are protected by the First Amendment decided this question in a way probably not in accord with applicable decisions of this court?

Essentially, this is a question of fact. It may be helpful at this point to review briefly the Mississippi procedure under which two separate courts and four separate juries held hearings on the merits and found adversely to petitioners.

The City Court is not a court of record. The City Judge, appointed by the City Council, sits as an ex officio Justice of the Peace. In criminal trials, the City does not utilize the services of a city attorney, while defendants may or may not be represented by counsel, as they desire. In that court, petitioners were convicted under an affidavit charging that they

> "* * * did then and there use loud and offensive talk and other conduct causing a threatened breach of the peace * * *"

RA 150, 152.

They appealed to the County Court of Washington County.

The County Court, an intermediate court, is a court of record, and has limited jurisdiction concurrent with the Circuit and Chancery Court. On appeal of a criminal case from the City Court, there is a complete trial *de novo* before a

judge and jury. §1202, Mississippi Code of 1942 (Recompiled), provides that on trial of an appealed case,

> "* * * the affidavit charging the offense and other proceedings may be amended at any time before a verdict, so as to bring the merits of the case fairly to trial on the charge intended to be embraced in the affidavit."

On appeal, the affidavits were amended to conform with §2089.5, Mississippi Code of 1942 (Recompiled) (RA 3, RC 5), and §252, Code of Ordinances of the City of Greenville (Rev. Ed., 1938) (RB 7, RD 5), and the basic charge on which petitioners were tried in the County Court was that they did

> "* * * disturb the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace."

RA 3, RC 5.

There were four separate trials in County Court and four separate juries. Each of the petitioners was first tried on the breach of the peace charge, and then tried upon the resisting arrest charge. In the second of these trials, it was first necessary to prove and to have the jury find that there was a lawful arrest on the breach of the peace charge, so that in point of fact, each petitioner was found guilty of conduct provoking a breach of the peace or which might reasonably lead to a breach of the peace by two separate juries.

It is interesting to note that on the first trial, each petitioner moved to quash the jury panel on the ground that Negroes had been systematically *excluded* by use of peremptory challenges (RA 22, RC 25); on each of the second trials, petitioners moved to quash the jury panel on the ground that negroes had been systematically *included*! (RB 23, RD 24).

Again, procedure is important, and should be considered by this Court in its independent investigation to determine whether petitioners' First Amendment right were violated.

On each breach of the peace charge, the jury was instructed by the County Court as follows:

> "The Court instructs the jury that if you believe from the evidence in this case beyond a reasonable doubt that (Petitioner) * * * did, on or about 1 July 1963, within the corporate limits of the City of Greenville, Washington County, Mississippi, disturb the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace, then it is your sworn duty to return the following verdict: 'We, the jury, find the defendant guilty as charged.'"

RA 6, RC 7.

On each resisting arrest charge, substantially the same charge was given except that the last clause was replaced with this language:

> "* * * in the presence of the arresting officer, and that he was thereupon placed under arrest, such arrest was lawful."

RB 9, RD 7.

In each of the four trials, the County Court instructed the jury as follows:

> "The Court instructs the jury for the defendant that if you find that the defendant was arrested for peaceful protest against racial segregation, then you cannot find the defendant guilty."

RA 9, RB 14, RC 9, RD 14.

In each of the resisting arrest cases, the jury was instructed:

"The Court instructs the jury for the defendant that if you find the arrest itself was illegal then you cannot find the defendant guilty of resisting arrest."

RB 15, RD 12.

These petitioners, then, were given a trial on the merits before the City Court and found guilty of talk or conduct which threatened a breach of the peace; each petitioner was tried before two separate juries, and each guilty verdict, under the instructions given by the County Court, constituted an affirmative finding of fact that: (1) petitioners were guilty of conduct which might reasonably have led to a breach of the peace; and, more important, (2) that the petitioners were not arrested for a peaceful protest against racial segregation.

Notwithstanding that the City Judge and four separate juries (two all-white juries and two bi-racial juries) have agreed that petitioners were prosecuted, not for the *content* of their speeches, but for the calculated effect upon the "mob", this Court properly should review the evidence for an independent determination of whether petitioners have been denied constitutionally guaranteed rights.

For a proper understanding and evaluation of the evidence in this case, it is necessary to examine the setting within which the action occurred. It is an unfortunate fact that the State of Mississippi, at the time of these occurrences had a public image in the field of civil rights which was, to say the least, rather shabby. This is not true of the respondent City of Greenville.

See: *A Report on Equal Protection in the South,* U. S. Commission on Civil Rights (November, 1965), pp. 94-97; RA 154-157; Appendix A.

The cited portion of the Civil Rights Commission report must be accepted as an impartial assessment, and because it imparts an accurate image of the respondent City of Greenville, for the convenience of the Court is as reproduced as Appendix A to this brief. Respondent is proud of its record of impartiality and fairness and of the fact that each individual has been and is accorded his constitutional rights without regard to race, creed, color or national origin, whether or no that individual is a resident citizen.

Petitioners are professionals in the civil rights field. They are Field Secretaries of the Student Non-Violent Coordinating Committee (SNCC) (RA 83, RC 64), which this Court judicially knows to be one of the more militant of the civil rights organizations, and an advocate of "Black Power." Petitioner McLaurin had been active as a SNCC worker in Greenville since September of 1962 (RA 82); Petitioner Cobb since November of 1962 (RC 63). Respondent *never* interfered with their activities (RC 73). The main thrust of the SNCC program was voter registration. When petitioners arrived in Greenville, their investigation into voter practices revealed that whites and Negroes were treated alike in registration, that there was a substantial number of qualified Negro voters, that there were no organizations of any kind to hinder or keep Negroes from registering or voting, and that poll taxes—then a prerequisite to voting—could be paid, not only at the county courthouse, but at every bank and branch bank in the county and at all outlying communities by white and Negro alike. (RC 64, 65)

This being true, petitioners turned their efforts in other directions—to sit-ins and park demonstrations. The majority

of the residents with whom petitioners worked were under 18 years of age (RA 85, 86). Petitioners had engineered the park demonstrations of the two young girls who were being tried in Municipal Court, and that was their interest in being present (RD 75, 76, RA 84). These same park demonstrations had very nearly erupted into a riot.

See: *Bolton v. City of Greenville*, 253 Miss. 656, 178 So2d 667 (1965).

We think these facts pertinent in that they bolster the jury findings that petitioners were not arrested for a peaceful protest against segregation. It is not likely, as a matter of common sense, that petitioner McLaurin was making a speech about voter registration, and it is significant that even he never testified he actually said anything about registering protest with the mayor, or about remedying the situation through voter registration; this is what he was "going to say" (RA 77), what he "meant by his language" (RA 78), and what he "had in mind" (RA 90). He was talking in a "very loud, very loud" (RA 26) voice.

Petitioner McLaurin *knew* the temper of that crowd which was peacefully dispersing at the conclusion of the trials (RA 51, RB 28, RC 49, RD 55, 61). To use his own words,

> "* * * I felt that if it was a tense situation out there that these people would—first of all they knew, some of them, that the kids had tried to use the park. They needed some kind of idea as to what steps to take. They were up-set; they were restless. The expressions on their faces characterized by restless energy, that they felt that something should be done. *But, then all it needed was a leader*, and I was going to try and show them where they could register their protest with the Mayor, and I didn't

feel that they were going to come up and attack me." (Emphasis added) RB 58.

Regardless of what he "meant" or "had in mind" or what he was "going to say," what he actually did say, taken from his own testimony, was:

Q. And, you were asking these people, what are you going to do about it, were you not?

A. I was asking them—first of all I was asking them if they were satisfied, and yes, what were they going to do about it.

Q. You did ask them what they were going to do about it?

A. I did.

Q. You asked them if they were going to stand for it, did you not?

A. Yes, I said are you going to stand for it.

Q. So that the testimony what (sic) the officers gave in your presence here in the Courtroom as to what you said so far as it went is correct, is it not?

A. As far as they said that they heard. I said—I think that what Officer Tackett said that he only caught these very two things, I said other things before that and after.

Q. Do you deny that you said anything that the officers testified in this trial said you said?

A. No.

Q. Do you admit it?

A. I admit that I said, are you going to stand for segregation, are you going to stand this, or are you going to take it?

Q. Now then, you were making those statements to a crowd of people that you knew to be up-set and shocked, is that correct?

A. I was making a statement to people—let it fall on the ears of people that would listen.

Q. And, you knew that they seemed to be up-set and shocked?

A. Yes.

RB 66.

In their brief, petitioners characterize the speeches as "of a vigorous and stirring nature" (p. 15) which "merely amounted to a call to action." (p 16) We submit petitioners correctly state the case on page 15 of their brief with the statement, "Petitioners intended to stir the persons in the crowd to action, * * *"

The question is, what action?

It is a fair inference that the unusually large crowd attending the trial of the girls for participation in the park demonstration was present as a result of SNCC efforts and for the purpose of giving the defendants support. Petitioners were "affiliated" with the girl demonstrators (RA 84). Their interest in the trial as field secretaries of SNCC was the reason for petitioners' presence (RC 76). It would therefore be fair to conclude that the 200-300 members of the crowd were citizens with whom petitioners had worked, or at least sympathetic to their cause. Nevertheless, not one single witness was produced from that crowd to substantiate petitioners' contention that the speech had anything whatsoever to do with encouraging voter registration, or lodging a protest with the Mayor.

We respectfully submit that use of the language admitted by petitioners, in a loud, emotional manner, directed at a crowd of up-set, emotional shocked persons, charged with a restless energy, was indeed a call to action; more nearly, it was like tossing lighted matches at a pan of gasoline.

The officers involved were competent, experienced, impartial, professional law enforcement officers.

See: *A Report on Equal Protection in the South*, U. S. Civil Right Commission, (November, 1965), pp. 94-97; RA 154-157; Appendix A.

The arresting officers were Officer Carson, a Negro veteran of 13 years on the force (RA 23) with the rank of detective; Officer Martin, a Negro veteran of 4 and 1/2 years on the force.

Chief Burnley, 17 years experience on the force, a graduate of the FBI National Academy, and specially trained in riot control described the scene as a fast-moving, "erupting" situation which could have got out of hand at any second, any minute (RD 57). He stated:

> "I was of the opinion that the situation was very tense. That at any minute we could have a riot or some violence to take place at that particular gathering."

RA 55.

Captain Tackett, a veteran of 13 years and an FBI graduate, stated "It seemed as though they were going to try and take the situation into their own hands." (RA 46) As he saw it, the temper of the crowd was increasingly worsening, and, in his opinion, "if the trend had of kept (up) there would have been some violence there." (RA 52)

Petitioners' brief (pp. 11, 19) seems to give the impression that after their arrest, the crowd peacefully dispersed. This is not in accord with the facts in the record. After petitioners' arrest, a short time was allowed for a voluntary dispersal of the crowd. It did not. Chief Burnley then ordered the crowd to disperse. It did not. (RC 44, 45). In point of fact, it became necessary for a detail of 15-18 officers to form a line in riot squad formation (RA 56, RB 44), to march into the crowd and compress it into a column of two's and three's, and then to bodily escort that crowd a distance of 12-15 blocks, out of the business district, where it was then dispersed. (RA 47, 48)

On the other hand, the inflammatory language admittedly used by petitioners—"Are you going to stand for segregation?" "Are you going to take it?" "Are you going to stand for this?" "Are you going to let them arrest my buddy?" "This is everybody's fight" "Let's all go to jail"—to a crowd that was upset, emotional, shocked, charged with restless energy and "only needing a leader," clearly supports all four jury verdicts finding that petitioners were guilty of conduct calculated to provoke a breach of the peace or reasonably leading to a breach of the peace.

REPLY TO REASONS FOR GRANTING THE WRIT

I

Petitioners were not engaged in any federally protected activity at the time of their arrests.

Petitioners rely principally on three cases to support their proposition that they were arrested because of the exercise of their "federal constitutional rights of free speech, assembly and petition:" *Terminiello v. Chicago,* 337 U. S. 1 (1949); *Edwards v. South Carolina,* 372 U. S. 229 (1963); and *Cox v. Louisiana,* 379 U. S. 536 (1965). All three cases are clearly distinguishable on the facts and in the principles involved.

In *Terminiello,* the case grew out of an address delivered in a capacity auditorium under the auspices of the Christian Veterans of America. Outside there was a larger, turbulent and angry crowd gathered to protest the meeting. Petitioner had been fined for disorderly conduct. The *trial court* had charged the jury that

> "* * * 'breach of the peace' consists of any 'misbehavior which violates the public peace and decorum'; and that the 'misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.'"
>
> 337 U. S. 1, 3.

As Mr. Justice Douglas succinctly put it, "the pinch of the statute is in its application." (337 U. S. at 6) The Court there correctly held that the statute, so construed, seriously invaded the province of First Amendment rights.

In all four cases presently before this Court, the trial court instructed the jury for the defendants (petitioners) that

> "* * * if you find that the defendant was arrested for peaceful protest against racial segregation, then you cannot find the defendant guilty."
>
> RA 9, RB 14, RC 9, RD 14.

Thus the jury was squarely presented a factual issue of whether petitioners were arrested and prosecuted because they were advocating unpopular views, or whether they were arrested and prosecuted because their conduct was calculated to or likely to provoke a breach of the peace.

The case of *Bolton v. City of Greenville*, 253 Miss. 656, 178 So2d 667 (1965) and *Bynum v. City of Greenville*, 253 Miss. 667, 178 So2d 672 (1965) were appeals from convictions of the girls who were being tried at the time petitioners were arrested. Their cases argued to the Supreme Court of Mississippi on the same day as petitioners' cases. In *Bolton* and *Bynum*, the girls' convictions were reversed in a unanimous decision on the reasoning that they were engaged in conduct which, although unpopular enough to very nearly cause a riot, was not illegal. These cases are alluded to in the Mississippi Supreme Court's opinion (Petitioners' Brief, Appendix 11a; 187 So2d 854, 859), and this distinction carefully drawn.

As stated in the opinion below of the Mississippi Supreme Court,

> "* * * This Court is fully cognizant of our duty to construe our statutes in such a manner to be sure they will not infringe upon the constitutional rights of any person. The statue (§2089.5) as construed by the trial court is not unconstitutional.

187 So. 2d at 859; Petitioners' Brief, Appendix 11a.

We suggest that it is unlikely the same Court which unanimously reversed *Bolton* and *Bynum* would unanimously affirm petitioners' convictions, had petitioners, like the girls, been engaged in the exercise of constitutional rights.

In *Edwards*,

> "* * * The City Manager testified that he recognized some of the onlookers, whom he did not identify, as 'possible troublemakers,' but his subsequent testimony made clear that nobody among the crowd actually caused or threatened any trouble."

372 U. S. at 231.

It can be said with some degree of certainty that the facts in *Edwards* establish a situation where the defendants were exercising First Amendment rights, and where there was no clear and present danger of violence.

Similarly, in *Cox*, this Court stated

> "* * * but our independent examination of the record, which we are required to make, shows no conduct which the State had a right to prohibit as a breach of the peace."

379 U. S. at 545.

As more fully covered in the Supplemental Statement above, and in Point II, below, both *Cox* and *Edwards* are distinguishable on the facts. The crucial distinction is that in those two cases the defendants were acting peacefully and were engaged in activities protected by the First Amendment (Cf. *Bolton v. City of Greenville, supra*). In the case at bar, petitioners had passed the bounds of argument or persuasion, and undertaken to incite the crowd to riot. This is not constitutionally protected action.

II

There is ample evidence of petitioners' guilt in the record to support their conviction.

As we view this controversy, we are dealing strictly with a question of fact. Petitioners' position is that they were attempting to persuade the crowd to qualify as voters and exercise rights as citizens. In their petition, they state it thusly:

> "* * * Petitioners intended to stir persons in the crowd to action, viz., assertion of their federal rights. * * *"
>
> Petition, p. 15.

Respondent's position is that petitioners' conduct was intended to (i. e., "calculated to") provoke disorder (i. e., a breach of the peace), and that petitioners were arrested as a necessary step to avert a riot.

In considering this question, this Court will make its independent examination of the records to determine whether petitioners' First Amendment rights have been violated. We do not quarrel with this; we welcome the investigation.

Nevertheless, at the outset of this examination, we feel this Court should take note of action at various levels of these cases:

(1) In the City Court, petitioners were tried on the merits without a jury. The City Judge found them guilty.

(2) In the county court, petitioners were tried *de novo* before four separate juries. Each jury was instructed by the County Court that if they believed petitioners were arrested for a peaceful protest against racial discrimination, they should be found not guilty. Each jury convicted.

(3) Although it is true that two juries were all white, it is also true that the other two juries contained enough Negroes as jurors to impel petitioners to move to quash the panel on the ground Negroes had been systematically included.

(4) The resisting arrest cases required a second conviction on the breach of the peace charges as a condition precedent to a finding of guilty; therefore, both juries found petitioners guilty of conduct calculated to provoke a breach of the peace independently of the first two jury findings.

(5) All four cases were reviewed on the record by the County Court and Circuit Court of Washington County with an exceptionally able judge (Hon. Arthur B. Clark, Jr., Harvard Law School, LLB 1948), and the convictions affirmed.

(6) All four cases were carefully considered by the Supreme Court of Mississippi, which was thoroughly cognizant of petitioners' constitutional rights, but which had no difficulty in concluding that "The arrest of appellant (McLaurin) and the subsequent arrest of Charles Cobb enabled the officers to control a situation that otherwise might have created a riot beyond control."

Petition, Appendix 12a; 187 So2d at 859.

In disposing of petitioners' contention that there was no evidence of guilt, that Court held:

> "Appellant's contention that there was no evidence of appellant's guilt of the charge is without merit. This contention is based solely upon the proposition that appellant's acts were constitutionally protected, and we hold that they were not for the reasons heretofore stated."
> Petition, Appendix 13a; 187 So2d at 860.

Without restating the detailed facts, let us examine the evidence directly bearing upon the evidence of guilt. In so

doing, we recall, but cannot locate the citation, where Mr. Justice Cardozo, considering what was "reasonable," said substantially that it was like a "jewel which varies in color and content with its setting."

In examining this precise question, this Court should be governed by the ground rules laid down by Mr. Justice Holmes in *Schenk v. U. S.*, 249 U. S. 47, 52-53 (1919), where he said:

> "* * * The most strigent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effects of force. (Citation omitted) The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to protect. It is a question of proximity and degree."

The question here, therefore, is whether the words used by the petitioners are used in such circumstances and are of such a nature as to create a clear and present danger of a riot or breach of the peace.

Let us first examine the circumstances. This was an abnormally large crowd for the Municipal Court (RD 54), assembled for the trial of two girls arrested for a park demonstration. It is a fair inference that petitioners' activities were responsible for the size of that crowd. After the trial, where both girls had been convicted, the crowd quietly leaving the courtroom and dispersing. The crowd was tense, upset, shocked. As described by petitioner McLaurin, "They were upset; they were restless. The expressions on their faces characterized by restless energy, that they felt something should be done.

But, then all it needed was a leader." (RB 58, emphasis added)

Petitioners' counsel inadvertently correctly and aptly described the crowd as a "mob." (RB 51) This designation was used by a skillful and capable lawyer. It means:

> "MOB. An assemblage of many people, acting in a violent and disorderly manner, defying the law, and committing or threatening to commit, depredations upon the property or violence to persons. (Citations omitted)
>
> "The word, in legal use, is practically synonymous with 'riot' but the latter is the more correct term."
>
> *Black, Law Dictionary* (4th Ed., 1951), 1154.

Taking petitioners' language in this context, regardless of what they "meant" or "intended to say", what they actually said can only be construed to be inflammatory. As petitioners' counsel puts it,

> "* * * What petitioners did succeed in saying merely amounted to a call to action; but nowhere in the record is there any indication that it was a call to unlawful action."
>
> Petition, p 16.

Under the circumstances then and there existing, with an emotional, upset, shocked crowd, with the "expressions on their faces characterized by restless energy", the language used by McLaurin (What are you going to do about it? Are you going to stand for this?"), and the language used by Cobb (Are you going to let them arrest my buddy? This is everybody's fight! Let's all go to jail![1]) is the precise equivalent to

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[1]) Cf. **Adderley v. Florida**, — U. S. —, 35 LW 4013, 4015 (14 Nov. 1966) where some of the petitioners "apparently wanted to get themselves put into jail too."

shouting "fire" in a crowded theater.

The undisputed testimony is that before petitioners' harangues, the crowd was peacefully dispersing and departing from the area. After the harangues, they disobeyed the orders of the Chief of Police to disperse, and it became necessary to form 15-18 officers into a riot formation, compress the crowd into a column of two's and three's, and to march them 12-15 blocks out of the business district.

We respectfully suggest that the affirmative findings of the City Judge and of four separate juries may not be lightly dismissed. They have the advantage of having heard the testimony *viva voce*, and of having had an opportunity to observe the demeanor and manner of speech of the witnesses, and to better judge the truth where there is a conflict.

We submit that the evidence in this record compels a finding that there was a clear and present danger of civil disorder which could be averted only by removal of petitioners from the scene.

Petitioners argue:

> "* * * Nor can this Court accept at face value the unsupported assertions of police witnesses that an imminent danger of breach of the peace existed."
>
> Petition, p. 19.

We respectfully suggest that this Court cannot ignore police testimony merely because it is police testimony. This is particularly true here. As appearances for petitioners disclose, their defense is provided by the NAACP Legal Defense and Educational Fund, Inc. In *A Report on Equal Protection in the South, supra*, the U. S. Civil Rights Commission quotes

James Edwards, chairman of the local NAACP as follows:

> "* * * When Negro leaders from Greenville appeared before the Commission, they were unanimous in expressing confidence in their local law enforcement officials. James Edwards, chairman of the local NAACP, testified that the attitude of the Negro community towards law enforcement was 'good' and that Negroes believed 'we have one of the best police forces in the State, one of the best police forces you will find. . .'
>
> "The confidence of the Negro community in Greenville police can be attributed to the determination of city officials to have *impartial and professional law enforcement.*"

Id. at 94-95; RA 154-155 (Emphasis added).

We submit this suggests that testimony of the officers, which petitioners do not deny (RB 66), should be accepted at face value.

Looking at the other side of the coin, whether petitioners' testimony is worthy of belief, we understand their contention to be that the content of their speeches was encouragement of voter registration, and that they were arrested for presenting these views to the crowd, and unpopular views.

We should like to make two observations we believe pertinent:

(1) Presumably the crowd of 200-300 persons, having been brought to the trial in support of the SNCC efforts, would have been favorably disposed towards petitioners. Yet not one single witness, other than themselves, came forward to corroborate their versions of the speeches.

(2) Petitioners' testimony shows that Negroes applying to register for voting were meticulously given the same treat-

ment as whites; a substantial number of Negroes were qualified electors; not only was there no impediment to Negro qualification, but it was actually encouraged and facilitated by making poll tax payment possible at all banks, branch banks, and major communities in the county outside Greenville. Voter registration in the respondent city was not and is not a controversial issue. There would, therefore, be no reason why respondent's police would seek to prevent speeches aimed at encouraging registration and qualification as voters. It is also significant that petitioners, paid field secretaries for SNCC, had been active in the respondent city for about nine and one-half months without interference of any sort from respondent.

On the merits, and on the basis of any reasonable examination of the record in this cause, petitioners' arrest and conviction was justified.

III

§2089.5 of the Mississippi Code, as applied by the trial court, is constitutional.

Criminal statutes are no more and no less than rules adopted by a civilized society to establish a minimum standard necessary to preserve an ordered life. They provide a framework within which individuals may form a community without loss of basic individual rights.

They fall into two broad categories: (1) those forbidding acts which are *malum per se*, and (2) those which are *malum prohibitum*. This Court hints at this distinction in *Dombrowski v. Pfister*, 380 U. S. 479, 491-492 (1965), in referring to "the sort of 'hardcore' conduct that would obviously be prohibited under any circumstances."

Thus, under the first category, murder, rape, robbery, rioting, provoking public disorder and similar acts would be a firm basis for criminal prosecution no matter how loosely worded the statute. The second category, where acts which were formerly acceptable conduct in the community become prohibited, requires that the statutes be spelled out with sufficient certainty to give fair warning to citizens of the shift in classification from legal to illegal. The "void for vagueness" doctrine should be limited in its application to statutes which are in the category of *malum prohibitum*, with the qualification always that an otherwise valid statute not be so applied as to impinge upon rights guaranteed by the constitution.

As Mr. Justice Douglas so aptly put it, "The pinch of the statute is in its application."

Terminiello v. Chicago, 337 U. S. 1, 6 (1949).

Thus in *Terminiello*, this Court reversed because the trial court had given an overly broad interpretation of the statute there involved to permit conviction for speech which invited dispute. In *Edwards v. South Carolina*, 372 U. S. 229 (1963), this Court reversed a conviction for breach of the peace where there was no violence or threat of violence. In *Ashton v. Kentucky*, —— U. S. ——, 16 LEd2 469 (1966), this Court reversed a conviction for criminal libel on the ground that the overly broad and vague construction of the crime given the jury by the trial court could not be cured by a more limited construction of the Kentucky Court of Appeals. In *Cox v. Louisiana*, 379 U. S. 536 (1965), this Court reversed a breach of the peace conviction where the statute, as construed by the trial court, allowed punishment for peacefully expressing unpopular views. However, significantly, in *Cox*, this Court held:

"From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. *The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.*"

379 U. S. at 554 (Emphasis added).

Cox was followed by *Greenwood, Mississippi v. Peacock*, —— U. S. ——, 16 LEd2 944, 956 (1966), where the Court stated:

"* * * First, no federal law confers an absolute right on private citizens — on civil rights advocates, on Negroes, or on anybody else — to obstruct a public highway, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman. Second, no federal law confers immunity from state prosecution on such charges."

These examples, hardcore offenses, would surely include, in principle, provoking a breach of the peace, inciting to riot, or precipitating violence.

The latest pronouncement of this Court is in *Adderley v. Florida*, — U. S. —, 35 LW 4013, (14 November 1966), which involved trespass convictions arising out of demonstrations at the jailhouse where it was argued:

"* * * that they (petitioners) had a constitutional right to stay on the property, over the jail custodian's objections, because this area chosen for the peaceful civil rights demonstration was not only "reasonable" but also

particularly appropriate. . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and wherever they please. That concept of constitutional law was vigorously and forthrightfully rejected in two of the cases petitioners rely on, *Cox v. Louisiana*, supra, at 554-555 563-564. We reject it again."

35 LW at 4016.

In the cases at bar, petitioners argue they were convicted for peaceful protest against racial discrimination, and that their convictions therefore violate their First Amendment rights. The record clearly discloses that the trial court gave a limited and narrow construction to the statute by specifically instructing the jury that if they believed petitioners were arrested for such a peaceful protest, they must be found not guilty. The Supreme Court of Mississippi, in affirming, held:

"Appellant also urges that section 2089.5 is so vague and indefinite as to permit the punishment of the exercise of the right of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States. His argument is based upon the contention that as applied here the term 'breach of peace' reaches federally protected activities that create unrest in others. The statute as drawn is in broad terms, but is not unconstitutional on its face. It is true that it could be construed in such a manner that it would reach federally protected activities, but we are well aware of the fact that neither this statute nor any other statute may be construed so as to infringe upon the state or federally protected constitutional rights of appellant or any other person."

McLaurin v. City of Greenville, — Miss. —, 187 So2d 854, 859, Petition, Appendix 11a.

In affirming, the Mississippi Supreme Court specifically held that the statute, *as construed by the trial court*, is not unconstitutional.

Thus the cases before this Court are instances where petitioners were convicted for conduct calculated to provoke a breach of the peace, or which might reasonably lead to a breach of the peace, and specifically not for a peaceful protest against discrimination which would be constitutionally protected. We submit, respectfully, that this appeal is governed by the decision of this Court in *Feiner v. New York*, 340 U. S. 315 (1951).

In *Feiner*, where this Court made its independent examination of the evidence to determine whether First Amendment rights had been violated, it stated:

> "* * * Our appraisal of the facts is, therefore, based upon the uncontroverted facts and, where controversy exists, upon that testimony which the trial judge did reasonably conclude to be true."

340 U. S. 316.

Here, the controversy is centered on whether petitioners were making a peaceful protest, or whether their conduct was calculated to or might reasonably have lead to a breach of the peace. The triers of fact were four separate juries, and the testimony reasonably supports their conclusions of guilt.

In *Feiner*, the offense charged was disorderly conduct, but the language of the statute involved is strikingly similar to that involved here. As set out in footnote 1 (340 U. S. at 318), the conduct condemned was that "with intent to provoke a

breach of the peace or whereby a breach of the peace may be occasioned." §2089.5 of the Mississippi Code condemns precisely the same conduct, and with substantially the same language.

In *Feiner,* where the defendants were tried before a judge without a jury, there was evidence supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. His conclusion that the police officers were justified in taking action to avoid a breach of the peace was approved by two courts on review. Here, the City Judge reached the same conclusion. His judgment is supported by the verdicts of four separate juries, by the judgment of the County Court denying a motion for a directed verdict, by the review of the Circuit Court of Washington County, and by the review of the Supreme Court of Mississippi.

In *Feiner,* this Court pointed out that these judgments and reviews supported the proposition that the officers were motivated solely by a proper concern for the preservation of order and the protection of the general welfare,

> "* * * and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for the making or content of his speech. Rather, it was the reaction which it actually engendered."

340 U. S. at 319-320.

Here, there is no shred of evidence that petitioners were arrested or that the arrests were sanctioned because the police objected to what was being said or because they disagreed with petitioners' views on voter registration.

Cf. *Adderley v. Florida*, — U. S. —, 35 LW at 4015. Here, there had been no interference with petitioners' activities in the voter registration field, and there were no obstructions to Negro registration—if anything Negroes' qualification as electors is seen to be encouraged and facilitated. The issues petitioners now claim they were raising are not controversial issues in the respondent city; in fact such issues do not exist.

We respectfully submit that *Feiner* is on all fours with the cases here under consideration. Petitioners contentions are not supported by any independent evidence from members of the crowd or mob, nor by any evidence which remotely suggests that the respondent city has ever attempted to suppress unpopular views.

IV

Petitioner Cobb is not entitled to reversal of his convictions because of systematic exclusion of Negroes from the jury where the records affirmatively shows a legitimate basis for exercise of peremptory challenges on the first trial, and respondent's acceptance of all Negroes tendered as jurors on the second trial.

On the first trial, for breach of the peace, petitioner Cobb moved to quash the petit jury panel for systematic exclusion of Negroes. Following this motion, the record discloses this:

"*By Mr. Robertshaw:*

"Comes now the City of Greenville and shows for the record that eleven Negroes were served with summons for jury duty at this time; that one was exempted being a principal of a school, that one could not be found, that of the nine who were present in the Courtroom,

one was excused at his request for hardship reasons by the Court, and another was excused after having disqualifying (sic) himself for the reason that he could not read or write. The City would further show that of Negroes actually placed in the box, peremptory challenges were used for the reason that in the best judgment of the City in the light of the extensive publicity, it was the feeling that such jurors would be biased."

RC 25-26.

This statement discloses that a substantial proportion of Negroes were summoned for jury duty, and that the Negroes actually placed in the jury box were peremptorily challenged because of possible bias related to their group affiliations, not because of their race. This is an entirely proper use of peremptory challenges.

Swain v. Alabama, 380 U. S. 202 (1965), which controls on this point, specifically so held. Mr. Justice White, after pointing out that counsel must decide, not whether a juror of a particular race is in fact partial, but whether one from a different group is less likely to be, concluded:

"* * * Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried."

380 U. S. at 221.

The pattern, if any, established by prosecutorial use of peremptories during part of a single week, is certainly not the "period of time" referred to by Justice White (380 U. S. at 227). In the second trial of petitioner McLaurin, the de-

fense moved to quash the panel on the ground of systematic *inclusion* of Negroes, and the defense exercised a peremptory challenge against a Negro juror (RB 23). In petitioner Cobb's second trial, he moved to quash the panel because of the systematic *"inclusion and/or exclusion"* (RD 25) of Negroes.

Thus the records before this Court affirmatively disclose that there was no systematic exclusion of Negroes on racial grounds. What transpired in the two cases against this petitioner is of far greater probative value than what may have happened in other cases.

Petitioner Cobb's position is entirely without merit. He seeks to travel in diametrically opposed directions at the same time. In the one case, he complains that peremptory challenges were exercised against Negroes for a perfectly proper reason; in the second case, he complains because respondent accepted Negro veniremen as they were called to the box where there was no valid challenge for cause.

CONCLUSION

Whether certiorari should be granted in this case is entirely within the discretion of this Court. What the petition presents to this Court is a pure question of fact, not a question of law. If the arrests were used by respondent for the purpose of suppressing a peaceful protest against racial discrimination, then we would agree that the convictions should be reversed and petitioners discharged. On the other hand, if the arrests were made for the sole purpose of averting civil disorder, then the case is governed by *Feiner v. New York, supra,* and certiorari should not be granted for the reason there is no new principle of law involved.

We respectfully submit that the findings of the City Judge in the initial trial, and of four separate juries in the County Court to the effect that petitioners were not arrested for any such peaceful protest, reviewed in turn by the County Judge, by the Circuit Judge, and by the Supreme Court of Mississippi, are amply supported by the evidence, and should not be disturbed.

Respectfully submitted,

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THE STATE OF MISSISSIPPI
COUNTY OF WASHINGTON

Personally appeared before me, the undersigned authority in and for the state and county aforesaid, J. ROBERTSHAW, who, being first duly sworn, states on oath that he has this date mailed three copies, each, of the foregoing Reply Brief for Respondent, via United States airmail, postage prepaid, to attorneys for petitioners addressed as follows:

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J. Robertshaw
J. ROBERTSHAW

SWORN TO AND SUBSCRIBED before me this 5th December, A. D. 1966.

Nancy Reed
NOTARY PUBLIC

My commission expires 5-31-67

APPENDIX A

Extract from *A Report on Equal Protection in the South*, U. S. Civil Rights Commission (November 1965).

GREENVILLE—A CONTRAST

The contribution that community support for impartial law enforcement, a professional police force, and firmly expressed intentions to enforce the law can make towards preventing racial violence was revealed in the Commission's study of Greenville, Mississippi. Greenville is the county seat of Washington County and the fourth largest city in Mississippi. When Negro leaders from Greenville appeared before the Commission, they were unanimous in expressing confidence in their law enforcement officials. James Edwards, chairman of the local NAACP, testified that the attitude of the Negro community towards law enforcement was "good" and that Negroes believed "we have one of the best police forces in the State, one of the best police that you will find. . . ."[46]

The confidence of the Negro community in Greenville police can be attributed to the determination of city officials to have impartial and professional law enforcement.

The chief of police, William C. Burnley, Jr., had served as a law enforcement officer in Greenville for 25 years and is a graduate of the FBI National Academy. Members of extremist groups were not permitted to join the police department, and

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43 The prosecuting attorney is elected by the county or the district. Miss. Code §§3910, 3920 (1956).

44 Miss. Code §§ 3836-41 (1956); Brookings Institution, op. cit. supra note 9, at 821-23. See also Highsaw and Fortenberry, op. cit. supra note 25, at 162-64.

45 Brookings Institution, op. cit, supra note 9, at 471.

46 T. 283. Edwards added, "We are sorry we can't say the same for the sheriff's force . . . " Ibid.

this policy was enforced by means of FBI checks of recruits and lie detector tests. Burnley's entire immediate staff (seven officers) have attended the FBI National Academy. Other officers have received training as detectives. Unlike other police forces in Mississippi, since 1950 the Greenville police force has included Negro officers. At the time of the Commission's hearing there were seven Negro police officers and several Negro crossing guards.[47]

In the spring of 1964, when many Mississippi communities feared violence because of the announced arrival of civil rights workers, officials in Greenville took steps to prevent trouble. The mayor and the city council issued statements which underlined the city's determination that law and order would prevail.[48] Mayor Dunne told the Commission, "This we meant and the people knew that we meant it."[49] The city's position was supported by public statements from citizens' groups in Greenville and by the local newspaper.[50]

The police displayed a similar attitude. Police Chief William C. Burnley, Jr., began a program of orientation and training for his officers in which he stressed their duty to enforce the law fairly and to prevent incidents of violence. The chief told his men that the policy would be, "Arrest no person regardless of who they are or what group they belong to unless they violated the law."[51] Those who felt they could not accept this policy were invited to leave the department. The police chief and other officials also took steps to advise themselves fully of the membership and activities of the Klan and similar organizations.[52]

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47 Testimony of Chief Burnley, T. 299.
48 T. 294.
49 Ibid.
50 T. 284, 289.
51 T. 297.
52 Ibid.

The community was apprised in April 1964 of police determination to prevent violence. When the Ku Klux Klan, in a show of strength, burned crosses in communities throughout Mississipi, Greenville was the only place where the persons responsible for cross-burnings were arrested and prosecuted. Later, when civil rights workers arrived in the community, there were no incidents of violence against them, nor was a single worker arrested by the Greenville police on any charge.[53]

On August 10, 1964, a white attacked a Negro, and, in a separate incident, a Negro attacked a white. Arrest were made almost immediately in both cases and identical fines imposed.[54] Following these incidents, Police Chief Burnley issued a statement:

> The issue with us is not which race assaults the other, but rather the idea of professional law enforcement. We intend to enforce the laws of the state and city as written without regard to one's station in life. This is the only way that peace and order can be obtained and continued.[55]

Chief Burnley testified at the hearing that his policy received "tremendous support from the community," and that without such support he believed his effectiveness would have been greatly diminished.[56] Two leading members of the white community, Albert Lake and Leroy Percy, testified that they thought that the business and professional community contributed to the quality of law enforcement in the city of Greenville. As Mr. Lake commented, "Voluntary groups . . . have

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53 T. 298.
54 Ibid.
55 Delta Democrat-Times (Greenville, Miss.), August 12, 1964, p. 4.
56 T. 298.

basically operated to give support to the governing body of the city and to the police force and to see that law and order was maintained."[57] Mr. Percy expressed a similar view:

> I think the basic reason for Greenville being the community that it is, is this: there has been a long history of responsible citizens willing to participate in local government, not only to involve themselves in voting and getting the vote out, but to serve as city councilmen, as members of the school board and so forth. I think that is basic.[58]

In other parts of the State local citizens did not publicly express their opposition to violence and their support of impartial law enforcement until extensive violence had already occurred. In McComb, violence continued for five months before local citizens issued the "Statement of Principles"[59] In Natchez, although a statement was prepared shortly after a series of whippings in February 1964, it was not published until October.[60] In February 1965 the Mississippi Economic Council (the State's chamber of commerce) issued a statement urging compliance with Federal law.[61]

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57 T. 289.
58 Ibid.
59 See pp. 38-41, supra.
60 See pp. 20-21, supra.
61 T. 379. Mr. Brumfield, of McComb, testified that the Mississippi Manufacturers Association, the Mississipp Association of Supervisors, and the Mississippi Sheriffs Association issued statements similar to the one in McComb. T. 49.

CONCLUSIONS

In many areas of Mississippi the failure of law enforcement officials to curb racial violence is largely attributable to the racially hostile attitudes of sheriffs, police chiefs, and prosecuting attorneys.

Law enforcement officers openly displayed racial hostility in many communities. In addition, failure to make prompt arrests, to take a firm stand against violence, and to announce an intention to punish law violators undoubtedly encouraged vigilantes to feel they could operate with impunity.